

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Amendment of Section 73.202(b),  
Table of Allotments.  
FM Broadcast Stations.  
(Amboy, California)

MB Docket No. 02-124  
RM-0446

TO: Assistant Chief, Audio Division  
Media Bureau

**CONSOLIDATED (1) OPPOSITION TO MOTION TO ACCEPT SUPPLEMENT AND (2)  
MOTION TO DISMISS COUNTERPROPOSAL OF CAMERON BROADCASTING, INC.**

Infinity Radio Operations, Inc. ("Infinity"), licensee of FM radio station KMXB, Henderson, Nevada, hereby submits its comments in opposition to the "Motion To Accept Supplement" and "Supplement" that Marathon Media Group, L.L.C. ("Marathon") and Cameron Broadcasting, Inc. ("Cameron") filed in this proceeding on October 23, 2002. **As** shown below, the Supplement is an impermissible attempt to amend Cameron's defective counterproposal filed July 15, 2002 in this proceeding (the "Counterproposal") and must be dismissed. In addition, the Counterproposal violates well established Commission policies in that it failed to address a protected conflicting allotment proposal; is contingent on a conditional downgrade of Station KSTJ(FM), Boulder City, Nevada from Class C to CO; and lacks the assurance of consent of more than two affected stations.<sup>1</sup>

<sup>1</sup> Because the Counterproposal **seeks** to modify the channel assignment of KMXB without Infinity's consent, Infinity is an interested party to this proceeding. The Motion To Accept Supplement ("Motion To Accept") and the Supplement were filed on October 23, 2002. This opposition to those pleadings is timely filed pursuant to 47 C.F.R. §§ 1.45(b) and 1.46(b). As

List ABOVE

## **I. Background**

On May 15, 2002, the Commission issued an omnibus Notice of Proposed Rule Making, DA-02-1246 ("NPRM"), in response to, *inter alia*, a February 11, 2002 petition from KHWY Inc. ("KHWY") for a new channel allotment at Amboy, California, (the "KHWY Petition"), that would advance several important Commission goals. According to KHWY, the proposed allotment would provide the first radio service to a "white area" of more than 3,500 square kilometers that includes portions of heavily traveled Interstate 40 and historic Route 66. *See* KHWY Petition at 1. This allotment would also provide second radio service to a "gray area" of more than 1,200 square kilometers, including additional portions of both highways, and the first local reception and transmission service for the community of Amboy. *Id.* In providing this service, KHWY would be fulfilling the Commission's three most important allotment priorities by providing first and second-time aural service and first local service. *Thermopolis, Wyoming*, 16 FCC Rcd 13066, 13069 n.5 (MMB 2001).

In response to the NPRM, Cameron filed its Counterproposal on July 15, 2002, seeking to alter eleven different FM channel assignments. As explained below, the Counterproposal was defective under longstanding Commission standards which require counterproposals to be technically correct and substantially complete at the time of filing and it violated important related policies governing rule making proceedings.

The Counterproposal did not address the short-spacing conflict that one of its eleven proposed changes -- the allotment of Channel 234C at Pahrump, Nevada -- would create with Marathon's protected allotment petition for Channel 233A at Tecopa, California, in MM Docket No. 01-135. In addition, the Counterproposal was made expressly contingent on the satisfaction of a set of undisclosed "conditions" before KJUL License, LLC ("KJUL"), licensee of

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discussed further below, Infinity's motion to dismiss the Counterproposal is also appropriately filed at this time in light of the dispositive record that has already been made.

KSTJ(FM), Boulder City, Nevada, would accept a downgrade from Class C to Class  $\infty$  status. That KSTJ downgrade is a necessary part of Cameron's elaborate Counterproposal. Finally, the Counterproposal (at 2) acknowledged that it did not have the consent of either KMXB or KKBK(FM), but then also disclosed that it lacked the required "assurance of agreement" with KJLJL. As noted above, KJUL had only "provisionally consented ... based on certain conditions." KJUL July 24, 2002 Motion to Dismiss ("KJUL Motion"), at 1.

Less than ten days after the Counterproposal was filed, KJUL formally withdrew its conditional consent to a downgrade in station class, cryptically stating that "one" of the undisclosed conditions to its consent had not been met, and asked the Commission to dismiss the Counterproposal. KJLJL Motion. In a belated attempt to rectify this defect, Cameron sought to reach a compromise with KJLJL. On July 30, 2002, KJUL notified the Commission that it had reached an agreement on the "terms" of an option by which KJUL would acquire Cameron's KFLG(FM), Kingman, Arizona, the same station that Cameron proposes in this proceeding to relocate to Pahrump, Nevada (Las Vegas market). Based on an anticipated agreement being reached within 30 days, KJUL withdrew the KJUL Motion. KJUL July 30, 2002 Withdrawal of Motion to Dismiss ("KJUL Withdrawal"), at 2. In other words, even the withdrawal remained predicated on the future satisfaction of the still unspecified conditions.

In the KJUL Withdrawal, KJLJL said that it would "notify the Commission promptly upon the expiration of the 30-day period as to the status of the agreement." *Id.* More than two months have passed since this deadline and KJUL has still not notified the Commission. In sum, since July 15, 2002, KJUL has sequentially attempted to grant with "conditions," then withdraw, then conditionally re-grant its consent to the Counterproposal, all the while failing to disclose the relevant conditions to the Commission and other parties.

On July 30, 2002, Marathon filed “Reply Comments” to address the Counterproposal. The Reply Comments demonstrated the Counterproposal’s fatal conflict with Marathon’s protected petition for Channel 233A at Tecopa and expressly requested dismissal of the Counterproposal. Reply Comments at 1 and 2. Twelve weeks later, on October 23, 2002, Marathon/Cameron filed the Motion To Accept and the Supplement. The Supplement states that because Marathon has now proposed in MM Docket No. 01-135 that Channel 250A be allotted to Tecopa instead of Channel 233A, Supplement at 1-2, “contingent upon [the] acceptance” of that proposal and the Motion To Accept, Marathon withdraws its request for dismissal of the Counterproposal. *Id.* at 2. Marathon and Cameron then “urge the Commission to act accordingly,” *id.*, without stating the specific action they want the Commission to take.

The Commission has not yet placed the Counterproposal on a public notice setting a date for filing responsive comments. It should never do so. For the reasons set forth below, the Commission should dismiss the Counterproposal and thereby avoid imposing further burdens on the Commission’s resources and delay in the disposition of this proceeding.

**II. The Motion To Accept and Supplement Are an Impermissible Attempt To Cure a Defective Counterproposal; The Counterproposal Fails to Meet the Commission’s “Technically Correct and Substantially Complete” Standard.**

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By their Motion to Accept and Supplement, Marathon and Cameron are belatedly attempting to amend the Counterproposal to cure a fatal defect that was not addressed and resolved by the time the Counterproposal was first filed nearly four months ago. However, under a longstanding requirement, the Commission has stated that “[c]ounterproposals are required to be ‘technically correct and substantially complete’ at the time they are filed.” *Cloverdale, Alabama, Supra*, 12 FCC Rcd 2090 ¶ 6 (MMB 1997). *See also Kaukauna, Wisconsin* 6 FCC Rcd 7142 n.2 (MMB 1991) (noting that because the “counterproposal was unacceptable *when initially filed*, it cannot now be considered” in the underlying proceeding);

*Broken Arrow, Kansas*, 3 FCC Rcd 6507, 6511 n.2 (MMB 1988). Indeed, when Marathon itself filed its July 30, 2002 Reply Comments opposing the Counterproposal, it recognized that the Counterproposal failed to meet this requirement, and called for its immediate dismissal.

As discussed above, under the Counterproposal, Channel 234C, Pahrump, Nevada, would be short-spaced to Marathon's previously protected petition to allot Channel 233A to Tecopa, California. The Tecopa channel was the subject of Public Notice, Report No. 2506 issued on October 23, 2001, with Reply Comments due on November 7, 2001, a date well before Cameron filed its July 2002 Counterproposal. As a result, when the Counterproposal was "initially filed," the Tecopa channel required protection from Cameron's subsequently filed Counterproposal. See *Pinewood, South Carolina*, 5 FCC Rcd 7609 (MMB 1990); *Mason, Texas*, DA 02-1389 (MMR 2002), *recon. pending*; *Benjamin, Texas*, DA 02-1372 (MMB 2002), *recon. pending*; *Tacoma, Georgia*, DA 01-2784 (MMB 2001).

Counterproposals that would have resulted in similar short-spacings have consistently been found to fail the Commission's "technically correct and substantially complete" standard and have been dismissed without consideration. See *Casper, Wyoming*, 15 FCC Rcd 15806 (MMB 2000) (dismissing channel proposal because it would be short-spaced to a vacant allotment site for another channel). See also, *Carlisle, Kentucky*, 12 FCC Rcd 13181, 13183 ¶ 4 (MMB 1997) (dismissing counterproposal that failed the technically correct and substantially complete standard "because it [was] short-spaced to the presently licensed site of Station WMOR-FM"); *Cloverdale, supra*, 12 FCC Rcd 2090.

The Commission has underlined the importance it places on counterproposals being "technically correct and substantially complete at the time they are filed" by explicitly stating that "counterproponents are not permitted to file curative amendments, especially where, as here, acceptance of such an amendment would prejudice another timely-filed [proposal]."

*Frederiksted, Virgin Islands*, 12 FCC Rcd at 2406 n.3. (MMB 1997). Such a circumstance exists here. Due to its failure to address the protected Tecopa allocation, the Counterproposal was neither technically correct nor substantially complete when filed. Its filing has severely prejudiced KHWY's timely and, but for the defective Counterproposal, immediately grantable proposal. Since July 15, 2002, the Counterproposal has delayed the allocation of a channel to provide first radio service to a "white area" of 3,680 square kilometers and second radio service to a "gray area" of 1,239 kilometers. **See**, KHWY Petition at 1. This vast, unserved area includes portions **of** both tourist-traveled, historic Route 66 and Interstate 40, which is used by thousands **of** travelers every day. *Id*

Simply put, in contravention of the Commission's "technically correct and substantially complete" standard, Cameron filed an incorrect and incomplete Counterproposal. The belated attempt of Marathon and Camcron to amend that proposal cannot be accepted. Because the Counterproposal was defective when filed and prejudices another properly filed proposal. Cameron may not file a curative amendment, nor may Marathon file one for it. *Frederiksted, supra*. Moreover, even if the Supplement were allowed, it would not alter the fact that Cameron's Counterproposal was fatally defective "at the time it was filed," i.e., at the *relevant* time. Consequently, the Commission must dismiss the Counterproposal without further consideration.

### **III. The Counterproposal Fails to Comply with the Commission's *Cut and Shoot, Texas and Columbus, Nebraska* Policies.**

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The Counterproposal must be dismissed because it failed to comply with the Commission policies set forth in *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (MMB 1996) and *Columbus, Nebraska*, 59 RR2d 1184, 1185 ¶ 4 (1986). These failures continue to this day.

A. Cut and Shoot, Texas Policy

In *Cut and Shoot, Texas*, and a long line of subsequent cases, the Commission has made clear **that** it will not accept rule making proposals that are contingent in nature.<sup>2</sup> Contingencies introduce uncertainty and disruption into a rule making proceeding and force the Commission to contemplate making decisions that may ultimately founder on the failure of fulfillment of a contingency. That portion of the Counterproposal which relates to KJUL's KSTJ(FM), Boulder City, Nevada, provides a textbook example of why the FCC's contingency prohibition is sound public policy.

First, Cameron cryptically stated in the Counterproposal that the proposed KSTJ downgrade from Class C to Class C0 status was "subject to certain conditions which Cameron anticipates will be satisfied (e.g., that the Counterproposal is granted by the FCC)." In other words, the Counterproposal was, at the time of its filing, subject to multiple contingencies that Cameron chose not to disclose in full to the Commission or the other interested parties. Cameron's exercise in vagueness has left Cameron and KJUL free to bail out of the Counterproposal at any time, for any reason. The Commission simply cannot tolerate such obfuscation and still maintain the necessary order in the administrative process.

Amazingly, KJUL *did* withdraw its conditional consent less than ten days after the Counterproposal was filed. KJUL stated only that one of the mysterious, unspecified "conditions" had not been met, its consent **was** therefore withdrawn, and the Counterproposal

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<sup>2</sup> *Auburn Alabama*, DA-02-2063, released Aug. 30, 2002 (Aud. Div. 2002), recently explained the policy against contingencies in **rule** making proceedings (at ¶ 4):

The rationale for this policy is that processing contingent proposals is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on the staff. The staff would either have to wait until the contingency is met, thereby further delaying action in a case, or would have to revisit a decision if a proposal was granted contingent on the outcome of an action that never occurred. In either case, the staff's attempts at processing cases and achieving finality is frustrated. (Footnote omitted.)

should be dismissed. Just days later, KJUL was back at the Commission, trying to reinstate its consent and resuscitate the Counterproposal, ostensibly because it had now agreed on the “terms” of an option to acquire Station KFLG(FM), Kingman, Arizona, from Cameron. KJUL promised to provide a status update within 30 days of that latest filing, but none has been forthcoming more than 90 days later. This parade of contingencies and reversals of course shows no sign of abating and compellingly illustrates why contingencies are not allowed in the first place. The Commission demands that counterproposals be firm and in place at the time of initial filing so that the Commission and affected parties do not waste time waiting for proponents and their allies to pull their act together (if they ever do).<sup>3</sup> The *Cut and Shoot* policy demands dismissal of the Counterproposal.

B. Columbus, Nebraska Policy

Noting the “significant amount of confusion to the public from [FM] stations changing frequencies,” the “substantial disruptions to a station’s business,” and the “waste of Commission resources,” the Commission has a well-established policy of not considering petitions that involve more than two channel substitutions for which consent has not been received.

*Columbus, Nebraska*, 59 RR 2d 1184, 1185 ¶ 4 (1986). This policy requires that counterproponents reach “an assurance of agreement among the affected stations to the proposal ... in advance of the filing of the petition.” *Kaukauna*, *supra*, 6 FCC Rcd at 7143 n.2 (emphasis added).

The Counterproposal asserts that it lacks the consent of only two stations. KMXB and KKBK(FM), Baker, California, and therefore complies with the Commission’s *Columbus*,

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<sup>3</sup> These same principles underlie the FCC’s established policy of not allowing reclassification of Class C stations to Class C0 by means of rule making counterproposals. See *1998 Biennial Regulatory Review*, 15 FCC Rcd 21649, 21664 (2000). In the rule making context, reclassification can be proposed only in original rule making petitions. 47 C.F.R. § 1.420(g), Note 2.



*Nebraska* policy. However, the Counterproposal (p. 13) also disclosed that the necessary consent of a third station was contingent on vague, unspecified “conditions.”

As noted above, less than ten days after the Counterproposal was filed, KJUL informed the Commission that its consent had only been “initially provisionally [given]” and that because the required conditions had not been met, it was withdrawing its consent and filing a Motion to Dismiss. KJUL Motion, filed July 24, 2002. Such a provisional, conditional consent, and the fact that it could be and was withdrawn, establish that Cameron did not obtain an “assurance of agreement” from KJUL “in advance of the filing of the petition,” and require the Commission to dismiss the Counterproposal under *Kaukauna*.

Even assuming *arguendo* that the initial failure to comply with this requirement of the *Columbus, Nebraska* policy did not compel dismissal, KJUL’s withdrawal of consent and the filing of its own Motion to Dismiss did so. At the moment of the withdrawal of KJUL’s provisional consent, there were *literally* three affected radio stations that did not consent to the *terms* of Cameron’s proposed changes, placing the Counterproposal in blatant violation of the *Columbus, Nebraska* policy.

In a transparent attempt to bring the Counterproposal into compliance with the *Columbus, Nebraska* policy, Cameron negotiated a new conditional consent with KJUL. KJUL’s July 30, 2002 filing with the Commission indicated that it would re-consent to the Cameron Counterproposal if the parties “conclude an agreement on the terms of an asset purchase ... within 30 days.” KJUL Withdrawal at 1. KJUL stated it would notify the Commission “promptly upon the expiration of the 30-day period” and granted consent to the Counterproposal conditional “on the terms set forth above.” *Id.* at 2.

This 30-day period lapsed on August 29, 2002. More than two months later, KJUL has not notified the Commission that the conditions necessary for the granting of its consent and

withdrawal of its Motion to Dismiss were met. As a result, the Counterproposal continues to lack the consent of three affected stations and continues in parent violation of the *Columbus, Nebraska* policy, as it has been from the day it was filed, requiring the Commission to dismiss it. *See Columbus*, SO RR 2d 1184.

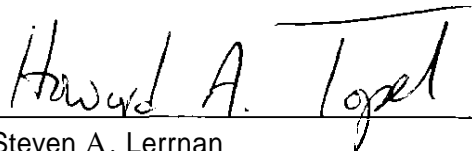
### CONCLUSION

The Commission should deny the Marathon/Cameron Motion To Accept; reject their improper Supplement; dismiss Cameron's defective Counterproposal; grant KHYW's proposal; and terminate this proceeding.

Respectfully submitted,

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November 6, 2002

## CERTIFICATE OF SERVICE

I, Joan M. Treppel, a secretary in the law firm of Leventhal Senter & Lerner PLLC, hereby certify that on this 6<sup>th</sup> day of November, 2002, I caused copies of the foregoing "Consolidated (1) Opposition to Motion to Accept Supplement and (2) Motion to Dismiss Counterproposal of Cameron Broadcasting, Inc." to be placed in the U.S. Postal Service, first class postage prepaid, addressed to the following persons:

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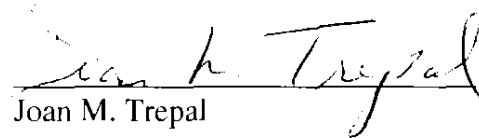
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